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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91198483
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Attachments	Opposer PsyBar, LLC's Motion for Summary Judgment and Memo of Law in Support.pdf (17 pages)(101317 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

PsyBar, LLC,

Opposer,

Opposition No.: 91198483

v. Serial No.: 85095429

David Mahony, PhD.,

Applicant.

OPPOSER PSYBAR, LLC'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT OF MOTION

Pursuant to T.B.M.P. § 528.08, 37 C.F.R. § 2.27(e), and Fed. R. Civ. P. 56, Opposer PsyBar, LLC ("PsyBar") respectfully submits this Motion for Summary Judgment and Brief opposing Applicant's application to register his mark based on the false suggestion of a connection between the Applicant's mark (PsyBari) and PsyBar's mark (PsyBar), the likelihood of confusion of these two marks by relevant consumers, the misleading nature of Applicant's mark, and the likely dilution of PsyBar's famous mark. Accordingly, PsyBar requests that the Trademark Trial and Appeal Board (the "Board") grant its Motion for Summary Judgment and dismiss Applicant's trademark application in its entirety.

INTRODUCTION

PsyBar is a Minnesota-based company providing a wide range of scientific consultation and evaluation services to a national client base consisting of attorneys, employee assistance

professionals, employers, insurance companies, mediators, occupational health professionals, safety experts and unions. PsyBar has consistently used the PSYBAR mark in commerce beginning in June of 1995 and received registration for the mark in September of 1996. Based on PsyBar's status as the leading and best-known specialty provider of forensic psychological and psychiatric assessment services in the country, PSYBAR constitutes and is considered to be a "famous mark" in the forensic and legal communities.

Applicant David Mahony has known about the existence and nature of PsyBar's business since at least 2003 when he signed an agreement with PsyBar to serve as one of its independent medical examiners. Years after Applicant's knowledge of PsyBar's industry-leading status, Applicant filed a trademark application for the PSYBARI mark, which was published for opposition in January of 2011. There is significant overlap in the consumer base of PsyBar's professional services and Applicant's PsyBari test. Applicant's use of the PSYBARI name is an improper attempt to capitalize on the goodwill and reputation of the PSYBAR mark. As a matter of law, the registration of the PSYBARI mark should be denied because the use in commerce of a mark that merely adds one vowel to the end of the well-known and established mark like PSYBAR creates a false suggestion of a connection between the two marks, will result in the likelihood of confusion on the part of consumers of PsyBar's and Applicant's services, will be misleading to the many consumers who are aware of PsyBar's existing reputation and professional services and will serve to dilute the famous PSYBAR mark.

FACTS

PsyBar is a Minnesota limited liability company organized in 1995 that has continually used the PSYBAR mark since its inception to identify the professional services it offers,

including: (1) personality and other psychological testing; (2) psychological profiles and psychological record analysis and assessments; (3) custom reports about recommended resources and treatments associated with a defined set of symptoms and concerns; and (4) psychological assessment and litigation services, psychological testing, and psychological testing services to forensic psychologists and psychiatrists, health, disability, and workers' compensation insurers, attorneys, employers and employee assistance programs, and other members of the forensic and legal communities. *See Affidavit of David C. Fisher*, ¶¶ 2, 3, and 5. The trademark "PSYBAR" was registered to PsyBar in 1996. *Id.* at ¶ 4 and Ex. A. PsyBar is the nation's leading and best-known specialist provider of forensic psychological and psychiatric assessment litigation services. *Id.* at ¶ 6. Based on PsyBar's prominent status in the industry, PSYBAR constitutes and is considered to be a "famous mark" in the forensic and legal communities. *Id.* at ¶ 21.

PsyBar enters into contractual agreements with assessing forensic psychologists and psychiatrists nationwide to examine patients and issue reports on its behalf. In 2003, Applicant signed an agreement with PsyBar to serve as a PsyBar independent medical examiner. *Id.* at ¶¶ 8-9. Two years later, in 2005, Applicant enrolled in PsyBar's on-line education program titled "Psychological and Psychiatric Assessment of Individuals for Disability Insurers." *Id.* at ¶ 24 and Ex. E. PsyBar became aware of the use by Applicant of a "PsyBari test" in 2010 and a subsequent "PSYBARI" trademark application when the PSYBARI mark was published for opposition in January of 2011. *Id.* at ¶¶ 10-11.

PsyBar is a nationally known psychological specialty provider of employee assistance programs, fitness for duty examinations and other examinations, evaluations and litigation strategy services, which routinely use psychological tests akin to Applicant's "PsyBari" test.

Both PsyBar and the PsyBari test are, or use, objective psychological assessment methods to provide accurate assessments of patients in forensic contexts. *Id.* at ¶ 12. The PsyBari test is ideally suited to be utilized by mental health professionals as a forensic tool in assessment or litigation strategy services. In fact, Applicant published an article entitled "Standardizing Presurgical Psychological Evaluations with the PsyBari Psychological Test," in which he states that the PsyBari test is a tool relied upon to determine which patients receive surgical clearance for a bariatric procedure. Disputes commonly arise from these medical coverage determinations and often result in lawsuits involving the type of litigation support services PsyBar offers. *Id.* at ¶ 15 and Ex. C.

PsyBar also frequently provides litigation strategy services regarding the evaluation and assessment of sexual abuse, including the preparation of psychological reports and expert testimony. Applicant published an article titled "Assessing Sexual Abuse/Attack Histories with Bariatric Surgery Patients" and a poster presentation titled "Validity of Sexual Abuse Assessments Using the PsyBari," both of which highlight the PsyBari test's use and significance in these patient populations. *Id.* at ¶ 15 and Ex. D. The use of PsyBari in this context would certainly confuse the reader as to whether PsyBari had any connection or affiliation with PsyBar.

There is significant overlap in the consumer base of PsyBar's services and Applicant's PsyBari test. For example, health care providers, insurers, employers, employee assistance programs and attorneys all rely on PsyBar to identify patients who are appropriate for surgical procedures or may be eligible for other insurance benefits. Also, the majority of PsyBar's forensic evaluations and litigation strategy services include and emphasize objective psychological testing. *Id.* at ¶ 14. Applicant's PsyBari test is similar to PsyBar's testing. Some

of PsyBar's forensic assessments and evaluations include bariatric patients whom, according to Applicant's own publications, are ideal candidates for the PsyBari test. These types of objective psychological tests are a normal part of forensic assessments conducted by PsyBar for its clients and PsyBar has conducted thousands of independent medical evaluations for its customers, some focusing on bariatric issues. *Id.* at ¶ 14.

Both PsyBar and the PsyBari test are, or use, objective psychological assessment methods to provide accurate assessments of patients in forensic contexts. The similarity in style and appearance of the two names, "PsyBar" and "PsyBari," including the capitalization of the "P" and "B" in both marks as used in commerce, is unmistakable.

ARGUMENT

Based on the foregoing facts and the legal argument, PsyBar moves for summary judgment in its favor and respectfully requests that the Board find that Applicant is not entitled to register the trademark PSYBARI as a matter of law.

I. Standing and Standard for Summary Judgment.

Summary judgment is appropriate where there are no genuine disputes as to any material fact, thus allowing the case to be resolved as a matter of law. Fed. R. Civ. P. 56(a). A factual dispute is only genuine if a reasonable fact finder could resolve the matter in favor of the non-moving party based on the evidence set forth. See *Opryland USA Inc. v. Great American Music Show Inc.*, 970 F.2d 847, 23 USPQ2d 1471, 1472 (Fed. Cir. 1992); *Olde Tyme Foods, Inc. v. Roundy's, Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1544 (Fed. Cir. 1992). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact, and that it is entitled to a judgment under the applicable law. See Fed. R. Civ. P.

56(a); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co. Inc.*, 833 F.2d 1560, 4 USPQ2d 1793, 1796 (Fed. Cir. 1987). The evidence on summary judgment must be viewed in a light most favorable to the non-movant, and all justifiable inferences are to be drawn in the non-movant's favor. *Lloyd's Food Products, Inc. v. Eli's, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2029 (Fed. Cir. 1993).

There is no dispute of material fact as to PsyBar's standing. PsyBar's pleaded registration and supporting Affidavit of David C. Fisher establish both standing and priority. *See, e.g., Cunningham v. Laser Golf Corp*., 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000) (party's ownership of pleaded registration establishes standing); *Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1286 (TTAB 1998) (citing *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974)) (priority not at issue where opposer introduces registration into evidence). In addition, there is no dispute of material fact as to PsyBar's opposition to the PSYBARI application for registration, which should be denied as a matter of law.

II. Likelihood of Confusion.

Applicant's mark should be denied because it is likely to be confused with PsyBar's prior mark. Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), is the statutory basis for a refusal to register due to likelihood of confusion with another mark. 15 U.S.C. §1052 provides that:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it . . . (d) Consists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive . . ..

15 U.S.C. §1052(d). Specifically, the issue is whether or not there is a likelihood of confusion, mistake or deception as to the source or sponsorship of the goods or services related to an applicant's mark. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 16, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("...mistaken belief that [a good] is manufactured or sponsored by the same entity ... is precisely the mistake that Section 2(d) of the Lanham Act seeks to prevent").

In determining whether or not an opposed mark should be denied registration due to the likelihood of consumer confusion, the Board generally focuses on the possibility that the purchasing public would mistakenly assume that an "applicant's goods originate from the same source as, or are associated with," an opposer's goods. *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In *Hilson Research, Inc. v. Society for Human Resource Management*, the Board found that, "[a]lthough confusion, mistake or deception about source or origin is the usual issue posed under Section 2(d), any confusion made likely by a junior user's mark is cause for refusal; likelihood of confusion encompasses confusion of sponsorship, affiliation or connection." 27 USPQ2d 1423, 1429 (TTAB 1993).

In considering the question of the likelihood of confusion in the context of a motion for summary judgment, the Board analyzes the facts in evidence related to the factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) to determine whether or not there are genuine disputes as to any of these factors which would be material to a decision on the merits. The thirteen factors considered in *du Pont* are:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

2. The similarity or dissimilarity of and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.

3. The similarity or dissimilarity of established, likely-to-continue trade channels.

4. The conditions under which and buyers to whom sales are made, i.e. "impulse" vs. careful, sophisticated purchasing.

5. The fame of the prior mark (sales, advertising, length of use).

6. The number and nature of similar marks in use on similar goods.

7. The nature and extent of any actual confusion.

8. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).

10. The market interface between applicant and the owner of a prior mark:

    (a) a mere "consent" to register or use.

    (b) agreement provisions designed to preclude confusion, i.e. limitations on continued use of the marks by each party.

    (c) assignment of mark, application, registration and good will of the related business.

    (d) laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.

11. The extent to which applicant has a right to exclude others from use of its mark on its goods.

12. The extent of potential confusion, i.e., whether *de minimis* or substantial.

13. Any other established fact probative of the effect of use.

du Pont, 476 F.2d at 1361, 177 USPQ at 567. Not all of the factors are relevant and only those relevant factors for which there is evidence in the record must be considered. *Id.* at 1361; 567-68; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003) (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1406-07, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)). Although the dominance given to the relevant *du Pont* factors may vary (*See du Pont*, 476 F.2d at 1361-62, 177 USPQ at 567-68), the following two factors are key considerations in any likelihood of confusion determination: the similarity or dissimilarity of the marks in their

entirety as to appearance, sound, connotation and commercial impression, and the relatedness of the goods or services as described in the application and registration(s). *See, e.g.*, *Federated Foods, Inc. v. Fort Howard Paper Co*., 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1244 (TTAB 2010); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

In the present case, PsyBar has introduced extensive and incontrovertible evidence concerning nearly all the *du Pont* factors that support summary judgment in its favor, which include: (1) the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) the similarity and the relatedness of both parties' products and services; (3) the similarity of established, likely-to-continue trade channels; (4) the lack of careful, sophisticated purchasing; (5) the fame of its prior mark; (6) the right to exclude others from using the PSYBAR mark; and (7) the likelihood that the confusion between PSYBAR and PSYBARI will be substantial.

Given the similarity in style and appearance of the two names in this case - "PsyBar" and "PsyBari" - a consumer would naturally conclude a direct relationship between the two marks (and their services), particularly within the forensic and litigation support services industry where the PsyBar name and PSYBAR mark already enjoy an established presence and visible name recognition. The similarity of the marks as to appearance, sound, connotation and commercial impression is compelling, as the marks are almost identical, with the addition of a single vowel at the very end of the PsyBar name the only minor variation. Courts have found likelihood of confusion between far less similar marks. *China Healthways Inst., Inc. v. Wang,* 491 F.3d 1337, 1341 (Fed. Cir. 2007) (the common word in CHI and CHI PLUS is likely to

cause confusion despite differences in the marks' designs); *In re West Point-Pepperell, Inc.,* 468 F.2d 200, 201 (CCPA 1972) (WEST POINT PEPPERELL likely to cause confusion with WEST POINT for similar goods); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 54 C.C.P.A. 1295, 376 F.2d 324 (1967) (THE LILLY as a mark for women's dresses is likely to be confused with LILLI ANN for women's apparel including dresses); *In re United States Shoe Corp.*, 299 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREDIT CAREER IMAGES for uniforms including items of women's clothing). The Board also recognized that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992).

The similarity and the relatedness of both parties' products and services and the similarity of established, likely-to-continue trade channels also are well-supported by the facts. As previous discussed, there is a significant and meaningful overlap of the consumer bases of PsyBar and Applicant's PsyBari test. The health care providers, insurers, employers, employee assistance programs and attorneys who use PsyBar's objective psychological testing services to identify patients who are appropriate for surgical procedures or may be eligible for other insurance benefits are many of the same consumer target groups for Applicant's PsyBari testing. In addition, there is a clear connection on the part of both service providers to bariatric patients, independent medical evaluation customers, fitness for duty and other examinations, as well as litigation strategy services more generally.

The lack of careful, sophisticated purchasing on the part of consumers of PsyBar's services and the PsyBari test is also evident. Because the consumers of PsyBar's services and

the PsyBari test would not engage in independent investigation regarding the source of these various objective tests (see Affidavit of David C. Fisher, ¶ 19), it will be assumed by consumers that PsyBari is either a product of or affiliated with PsyBar when no connection would actually exist between the companies, their products and services or their marks.

PsyBar also has the right to exclude others from using the PSYBAR mark. PsyBar has used its registered mark in commerce for more than seventeen years and is entitled to and enjoys all the benefit and protection of its valid, subsisting, unrevoked, uncanceled and incontestable mark, including the right under the Lanham Act to exclude others from using a confusingly similar mark.

The likelihood of confusion created by Applicant's marketing of the PsyBari test as to the source or sponsorship of the test is substantial, based on the foregoing factual and legal analysis. Both PsyBar and the PsyBari test include objective psychological assessment methods to provide accurate assessments of patients in forensic contexts in the same industry and to the same community of consumers. Because the Applicant has been affiliated with PsyBar as an independent medical examiner, coupled with the similarity in style and appearance of the two names, "PsyBar" and "PsyBari," the apparent but false connection between the two marks in the minds of consumers is highly likely.

Although the "nature and extent of any actual confusion" is one of the listed *du Pont* factors, actual confusion is not a prerequisite to the Board's determination of the likelihood of confusion; the absence of evidence of actual confusion does not raise a genuine dispute as to any material fact. As set forth in *Weiss Associates v. Hrl Associates, Inc,* "The test is likelihood of confusion not actual confusion … It is unnecessary to show actual confusion in establishing

likelihood of confusion." *Weiss Associates v. Hrl Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1842-43 (D.C. Cir. 1990); *Apple Computer v. TVNET.net, Inc*., 90 USPQ2d 1393, 1397 (TTAB 2007) ("applicant's arguments regarding the lack of actual confusion and its good faith adoption of its VTUNES.NET mark do not raise genuine issues of material fact that preclude entry of summary judgment").

Finally, according to *du Pont*, the "fame of the prior mark" is a factor to be considered in determining likelihood of confusion. 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973). Famous marks are afforded a broad scope of legal protection because they are more likely to be remembered and associated in the public mind than a weaker mark. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1374, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); *Bose Corp. v. QSC Audio Prods. Inc*., 293 F.3d 1367, 1371-76, 63 USPQ2d 1303, 1305-09 (Fed. Cir. 2002) (finding opposer's marks, ACOUSTIC WAVE and WAVE, to be famous and thus entitled to broad protection). When present, the fame of a mark is "a dominant factor in the likelihood of confusion analysis . . . independent of the consideration of the relatedness of the goods." *Recot*, 214 F.3d at 1328, 54 USPQ2d at 1898.

The fame of a mark may be shown by evidence of the quantity of sales of products bearing the mark, the amount of advertising expenditures relating to the mark, and the length of time that these indications of commercial awareness have been evident. See *Bose Corp. v. QSC Audio Prods. Inc., 293 F.3d 1367, 1371, 63 USPQ2d 1303, 1305-06 (Fed. Cir. 2002)*. For purposes of evaluating the potential dilution of a mark, which will be discussed more fully in Section IV, the Federal Trademark Dilution Revision Act of 2006) at 15 U.S.C. § 1125 (c)(2)(A) states that:

> ...a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:
>
> (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
> (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
> (iii) The extent of actual recognition of the mark.

The PsyBar mark is famous within the Applicant's and PsyBar's industry. PsyBar's advertising and publicity of its services are national in scope, as are the provision of the services and its customer base. PsyBar has used and promoted its mark nationally for more than seventeen years and is the nation's leading and best-known specialist provider of forensic psychological and psychiatric assessment litigation services. PSYBAR constitutes and is considered to be a "famous mark" particularly within the forensic and legal communities. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265 (Fed. Cir. 2002) (reasonable doubt as to likelihood of confusion is resolved against the newcomer "for the newcomer has the opportunity of avoiding confusion, and is charged with the obligation to do so.").

Accordingly, Applicant's mark should be denied.

III. False Suggestion of Connection.

Section 2 of the Trademark Act, 15 U.S.C. § 1052, states that:

> No trademark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it. . .(a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or **falsely suggest a connection with persons, living or dead, institutions**, beliefs, or national symbols, or bring them into contempt, or disrepute. .

15 U.S.C. § 1052(a) (*emphasis added*.) In the case at bar, the simple addition by Applicant of an "i" to the end of the PsyBar mark, falsely suggests a connection with PsyBar and its established and favorable reputation in the industry. Applicant is clearly endeavoring to improperly and illegally capitalize on the success of PsyBar's established mark that he has known about since at least 2003. Given Applicant's participation in the same industry, the likely use and overlap of the PsyBari test within the same consumer base as PsyBar, and Applicant's verified history as an independent medical examiner under contract with PsyBar, the trademark application for the PSYBARI mark should be denied under § 1052 as falsely suggestive of a connection with PsyBar, when, in fact, no such connection has ever existed.

IV. Dilution.

Even in cases where there is no likelihood of confusion, dilution of a famous mark is still a viable basis to deny Applicant's mark. 15 U.S.C. § 1125 (c)(2)(B) states that:

> For purposes of paragraph (1), "dilution by blurring" is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following: (i) The degree of similarity between the mark or trade name and the famous mark; (ii) The degree of inherent or acquired distinctiveness of the famous mark; (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark; (iv) The degree of recognition of the famous mark; (v) Whether the user of the mark or trade name intended to create an association with the famous mark; and (vi) Any actual association between the mark or trade name and the famous mark.

15 U.S.C. § 1125 (c)(2)(B). Courts have found that a plaintiff in an action under the anti-dilution law "must show that its mark is famous and distinctive, that defendant began using its mark in commerce after plaintiff's mark became famous and distinctive, and that defendant's mark is likely to dilute plaintiff's mark." *Visa Int'l Serv. Ass'n v. JSL Corp*., 610 F.3d 1088, 95 USPQ2d

1571 (9th Cir. 2010) (c*iting Jada Toys, Inc. v. Mattel, Inc.,* 518 F.3d 628 (9th Cir. 2008) (defendants' use of the term "eVisa" for its multilingual education and information business was likely to dilute the Visa trademark.)). The *Visa* court also made clear that a plaintiff attempting to demonstrate the likelihood of dilution "is not required to go to the expense of producing expert testimony or market surveys, it may rely entirely on the characteristics of the mark at issue." Since PsyBar is the registered owner of a famous mark, it has the statutory right to prevent a competing and extremely similar mark from impairing through dilution the distinctiveness of its famous mark.

The statutory factors of a dilution claim include the degree of similarity between the Applicant's mark and PsyBar's famous mark. As previously discussed at length, the PSYBARI mark that simply adds one vowel to the end of the famous PSYBAR mark is extremely similar to PsyBar's prior mark. Applicant's lack of creativity in formulating its own original mark is disturbing. The degree of inherent or acquired distinctiveness of the famous mark is also supported by the facts of this matter, including the Affidavit of David C. Fisher. As the nation's leading and best-known specialist provider of forensic psychological and psychiatric assessment services and the only entity to use the PsyBar mark, the famous mark is very distinctive and enjoys a high degree of recognition in the industry. The PsyBar mark would become diluted should Applicant be allowed to capitalize on the goodwill and favorable reputation of the famous PsyBar mark by registering his proposed PSYBARI mark and continuing to use that mark in commerce. The extent to which PsyBar has the right to engage and is engaging in substantially exclusive use of the mark is uncontested; no other known individual or entity in the legal or

forensics community has used or attempted to use a mark similar to PsyBar, with the disturbing exception of Applicant and his "PsyBari" mark application.

Regarding the *Visa* factors that support PsyBar's dilution claim, in addition to its role as a famous and distinctive mark, use and registration of the PSYBAR mark predated Applicant's use by more than a decade, Applicant's prior knowledge of the PsyBar mark, the factors set forth by 15 U.S.C. § 1125 (c)(2)(B), and the related case law strongly support PsyBar's establishment of the likelihood of dilution of its famous mark. Allowing registration of a PSYBARI mark has and will continue to dilute the famous PSYBAR mark and the appreciable goodwill that it has earned in the legal and forensics communities since 1995.

CONCLUSION

The Applicant's use of and trademark application for the PSYBARI name is an improper attempt to capitalize on the long-established goodwill and reputation of the PSYBAR mark, which the Applicant has been aware of since at least since 2003 when he entered into a contractual agreement with PsyBar to be one of its approved independent medical examiners. The use in commerce of a PSYBARI mark that does nothing more than add one vowel to the end of the well-known and established PSYBAR mark is confusingly similar and will be extremely likely to cause consumer confusion and mislead consumers as to the source, origin, and endorsement of the PsyBari test. In addition, the use in commerce of a PSYBARI mark has and will continue to dilute the famous PSYBAR mark and the significant goodwill that it has developed in the legal and forensics communities since 1995.

There is no genuine dispute as to any material fact that PsyBar has established its standing; that PsyBar has priority; or that the PsyBari mark of Applicant and the registered

PsyBar mark are similar and the goods/services are related. Accordingly, PsyBar has established its priority and the false suggestion of a connection between the marks, the likelihood of confusion between the marks, and/or the likelihood that Applicant's use in commerce of the PsyBari mark will dilute its famous PsyBar mark.

Based on the foregoing facts and legal argument, PsyBar moves for summary judgment in its favor and respectfully requests that the Board find that Applicant is not entitled to register the trademark PSYBARI as a matter of law.

Respectfully submitted by,

KRETSCH & GUST PLLC

Dated: April 4, 2012

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